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SUPREME COURT, U.S.

No. 78-6885

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

FLYNN NOYE HICKS

Petitioner,

v.

THE STATE OF OKLAHOMA

Respondents.

RESPONSE BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

FLYNN NOYE HICKS, Petitioner,	)	
v.	)	No. 78-6885
THE STATE OF OKLAHOMA, Respondents.	)	

BRIEF OPPOSING CERTIORARI

COMES NOW Jan Eric Cartwright, Attorney General for the State of Oklahoma, by and through Janet L. Cox, Assistant Attorney General, and on behalf of the State of Oklahoma and for answer to the Petition for Writ of Certiorari submits to this Honorable Court the following brief in opposition thereto.

I.

JURISDICTION

Petitioner Hicks seeks review pro se by way of Petition for Writ of Certiorari from the Oklahoma Court of Criminal Appeals. On the 3rd day of March, 1979, the aforesaid court entered its Order affirming the Judgment and Sentence rendered in the District Court of Oklahoma County, State of Oklahoma, on the 14th day of April, 1977.

II.

ISSUES PRESENTED

1. Whether the Oklahoma Court of Criminal Appeals' failure to modify the Judgment and Sentence imposed by the trial court under the unconstitutional provisions of 21 O.S. Supp. 1977, § 51(B) constitutes a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

2. Whether the trial court's instruction to the jury as to the imposition of punishment based upon an unconstitutional provision of the Oklahoma Habitual Criminal Act, 21 O.S. Supp. 1976, § 51(B), constituted a violation of the Due Process Clause of the Fourteenth Amendment.

3. Whether the imposition of a forty (40) year prison term for the offense of Unlawful Distribution of a Controlled Dangerous Substance, After Former Conviction of a Felony, in violation of 63 O.S. Supp. 1976, § 2-401, is excessive and constitutes cruel and unusual punishment within the purview of the Eighth Amendment to the United States Constitution.

III.

STATEMENT OF THE CASE

Petitioner, Flynn Noye Hicks, hereinafter referred to as "Mr. Hicks," was charged conjointly by information with Diane Elizabeth Jones in the District Court, Oklahoma County, State of Oklahoma, Case No. CRF76-4597, for Unlawful Distribution of a Controlled Dangerous Substance, in violation of 63 O.S. Supp. 1976, § 2-401, After Former Conviction of two (2) Felonies, to-wit: Burglary in the Second Degree and Assault and Battery with a Dangerous Weapon with Intent to do Bodily Harm (O.R. 1). Mr. Hicks was tried by jury on April 12, 13 and 14, 1977, and represented by counsel. The jury thereafter returned a verdict of guilty for the offense of Unlawful Distribution of a Controlled Dangerous Substance and assessed punishment during the bifurcated sentencing proceeding in accordance with the enhancement provisions of 21 O.S. Supp. 1976, § 51(B) at forty (40) years imprisonment under the custody and control of the Oklahoma Department of Corrections.

Mr. Hicks subsequently perfected his appeal from the aforesaid Judgment and Sentence to the Oklahoma Court of Criminal Appeals, Case No. F-77-751. Thereafter, on the 3rd day of March, 1979, the aforesaid court denied Mr. Hicks' request for reversal or modification of the punishment and affirmed the verdict and decision of the trial court in an unpublished opinion.

Petitioner Hicks now comes to this Court requesting the following relief: (1) grant a Writ of Certiorari to review the final Judgment No. F-77-751 of the Oklahoma Court of Criminal Appeals, (2) appoint an attorney to represent petitioner in this Court, (3) hold Oral Arguments, and (4) vacate final Judgment No. F-77-751 of the State Court with instructions [to] vacate

the Petitioner's forty (40) years and thereafter to allow the petitioner an opportunity to be heard at a new penalty trial prior to the imposition of any new sentence.

In addition, on or about August 20, 1979, Petitioner Hicks filed with this court an Application to consolidate this case, pursuant to Rule 43(5), with Rummel v. Estelle, 587 F.2d 651 (5th Cir. 1978), cert. granted, May, 1979, now pending for consideration on the merits before this Court.

IV.

STATEMENT OF THE FACTS

The relevant facts pertaining to the issues presented in the case at bar indicate that this matter came on for jury trial on the 12th day of April, 1977. The State called three (3) witnesses whose testimony established that on October 5, 1976, Mr. Hicks consummated a sale involving a balloon of heroin with Agents of the Oklahoma Bureau of Narcotics and Dangerous Drugs for a purchase price of $25.

The defense called one witness, the Court Reporter, concerning the whereabouts of the transcript of the Preliminary Hearing.

Whereupon, after instructions and closing arguments, the jury retired and returned a verdict of guilty against Mr. Hicks for the offense of Unlawful Distribution of a Controlled Dangerous Substance.

In the second phase of the trial, conducted for the purpose of assessing punishment, the State called two (2) witnesses. The first witness, W. L. Curlee, identified Mr. Hicks as one in the same person named in the Judgment and Sentence (State's Exhibit number 5) in "State of Oklahoma versus Flynn N. Hicks," case number CRF-70-1250, Burglary in the Second Degree, wherein Mr. Hicks entered a voluntary plea of guilty and was represented by counsel (Tr. 166).

The State then called Eddie Hockletubbe as its second witness. The witness identified State's Exhibit #6 as the Judgment and Sentence Suspended on Plea of Guilty, Case No. CRF-75-2198, styled The State of Oklahoma versus Flynn N. Hicks, for the

offense of Assault with a Dangerous Weapon with Intent to do Bodily Harm. The witness identified Mr. Hicks as one and the same person named as the defendant in State's Exhibit #6 (Tr. 168).

The Court then instructed the Jury as follows (O.R. 16):

> "You are instructed that as to the defendant Flynn Noye Hicks the law provides that every person who, having been twice convicted of felony offenses, commits a third, or thereafter, felony offenses within ten (10) years of the date following the completion of the execution of the sentence, shall be punished by imprisonment in the State Penitentiary for a term of twenty (20) years plus the longest imprisonment for which the said third or subsequent conviction was punishable, had it been a first offense.
>
> "Under the facts of this case this means that should you find that this defendant has been twice convicted of felony offenses and that he committed the present offense within ten years of the completion of both of the previous offenses, then you shall assess his punishment at forty (40) years imprisonment in the State Penitentiary.
>
> "Should you find that this defendant had previously been convicted of only one felony offense at the time he committed the present offense, then you shall assess his punishment at imprisonment in the State Penitentiary for a term not less than ten (10) years.
>
> "Should you find that this defendant has not been previously convicted of any felony offenses, then you shall assess his punishment at imprisonment for not less than five (5) years nor more than twenty (20) years and a fine of not more than Twenty Thousand Dollars ($20,000.00)."

The prosecutor then submitted his argument and the following excerpts from the transcript reflect comments of the State's attorney (Mr. Geb) concerning the "mandatory" forty (40) years:

> "It's mandatory the Legislature said, as Your Honor read to you in the Instructions. And the Judge sets the law out, I don't and the other attorneys don't.
>
> "It is mandatory that they get forty years if you find that he has been convicted of two felonies before. And you've heard the evidence that he had been." (Tr. 172, lines 14-19)
>
> • • •
>
> "and the State would be interested in hoping that you take a strong stand on the pusher and find them guilty. And take a

strong stand and return a verdict of fifteen years as punishment for her, and a term of forty years as set out in the statutes as mandatory by the State Legislature." (Tr. 173, lines 14-19)

Defense counsel (Mr. Pearson) then responded as follows:

"When the District Attorney says mandatory forty years, that is not quite true. If you should find from your -- by your verdict certain things, then the law says that you've got to do it.

"But you don't have to find those things. You are the judges of the facts." (Tr. 174, 175)

In his final closing appeal to the Jury for the State, Mr. Geb again commented as follows:

"And Mr. Pearson, I thought heard the Court's Instructions. The Court's Instructions were that under number four. You may like to read this.

"'Under the facts of this case this means that should you find that this defendant has been twice convicted of felony offenses and that he committed the present offense within ten years of the completion of both of the previous offenses, then you shall assess his punishment at forty (40) years imprisonment in the State Penitentiary.'

"Forty years. I don't see how he can tell you to ignore the two previous felony convictions. You have heard the testimony. He even stipulated." (Tr. 179, 180)

Upon the conclusion of Mr. Geb's comments, the Jury retired to deliberate the punishment of Mr. Hicks. They assessed punishment at forty (40) years.

From these facts, Petitioner raises constitutional errors for this Court's determination.

ARGUMENT AND AUTHORITY

PROPOSITION I

PETITIONER WAS NOT DENIED EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT BY REASON OF THE OKLAHOMA COURT OF CRIMINAL APPEALS' FAILURE TO MODIFY THE TERM OF PUNISHMENT.

In essence, Mr. Hicks contends that he was denied equal protection of the law as a result of being sentenced at the trial court level pursuant to 21 O.S. Supp. § 51(B). The aforesaid statutory provision was declared unconstitutional by the Oklahoma Court of Criminal Appeals in the decision of Thigpen v. State,

Okl.Cr., 571 P.2d 467 (Oct. 14, 1977). 21 O.S. Supp. 1977, § 51(B) provided as follows:

"Every person who, having been twice convicted of felony offenses, commits a third, or thereafter, felony offenses within ten (10) years of the date following the completion of the execution of the sentence, shall be punished by imprisonment in the State Penitentiary for a term of twenty (20) years plus the longest imprisonment for which the said third or subsequent conviction was punishable, had it been a first offense; provided, that felony offenses relied upon shall not have arisen out of the same transaction or occurrence or series of events closely related in time or location; provided, further, that nothing in this section shall abrogate or affect punishment by death in all crimes now or hereafter made punishable by death."

Under this provision, Mr. Hicks in the instant case was sentenced to twenty (20) years, plus the maximum sentence provided by 63 O.S. Supp. 1976, § 2-401, for a total of forty (40) years.

The ambiguity inherent in the practical application of § 51(B) resulted in a defendant with two or more prior offenses being limited to a term of twenty (20) years plus the maximum assessable punishment for conviction under the new charge. However, an offender with one offense was subject to an indefinite period of confinement not less than ten (10) years. As the Oklahoma court determined in its opinion, § 51(B) defeated the obvious intent of the Legislature to authorize progressively greater punishment for habitual criminals.

In declaring § 51(B) unconstitutional, the Court was faced with the problem of what punishment should be assessed in those cases where the trial court had instructed under § 51(B).

Inasmuch as 21 O.S. Supp. 1976, § 51 contained a severability clause, the remaining provisions, specifically § 51(A), were not impaired. Title 21 O.S. § 51(A), left intact by the Oklahoma Court in Thigpen, reads:

"Every person who, having been convicted of any offense punishable by imprisonment in the penitentiary, commits any crime after such conviction is punishable therefor as follows:

> "1. If the offense of which such person is subsequently convicted is such that upon a first conviction an offender would be punishable by imprisonment in the penitentiary for any term exceeding five (5) years, such person is punishable by imprisonment in the penitentiary for a term of not less than ten (10) years.
>
> "2. If such subsequent offense is such that upon a first conviction the offender would be punishable by imprisonment in the penitentiary for five (5) years, or any less term, then the person convicted of such subsequent offense is punishable by imprisonment in the penitentiary for a term not exceeding ten (10) years.
>
> "3. If such subsequent conviction is for petit larceny, or for any attempt to commit an offense which, if committed, would be punishable by imprisonment in the penitentiary, then the person convicted of such subsequent offense is punishable by imprisonment in the penitentiary for a term not exceeding five (5) years."

Thus, in reviewing cases subsequent to Thigpen, supra, the Oklahoma Court of Criminal Appeals has taken one of two approaches in reviewing the assessed punishment. The first approach, as alluded to by Mr. Hicks, resulted in a modification of the sentence in the "interest of justice." Lee v. State, Okl.Cr., 572 P.2d 260 (Nov. 9, 1977). It is interesting to note from a reading of the Lee case, supra, that the court was concerned about certain prejudicial remarks made by the prosecuting attorney during the course of the trial. On the basis of the improper remarks, as opposed to a sentence imposed under § 51(B), the punishment was modified.

The second approach is reflected in the decisions of Kitchens v. State, Okl.Cr., 576 P.2d 775 (March 27, 1978) and Barrett v. State, Okl.Cr., 573 P.2d 1221 (January 25, 1978). In these cases, no modification of sentence was made since the sentence imposed was clearly permissable and within the provision of 21 O.S. Supp. 1976, § 51(A), which would have been the proper statute for sentencing the twice previously convicted defendant. Further, the Court found no prejudicial errors in these cases as in the Lee case, supra, which required modification of the sentence.

However, it is this alleged "ad hoc" approach taken by the Oklahoma Court of Criminal Appeals subsequent to Thigpen, supra,

which apparently forms the basis of Petitioner's claim of a denial of equal protection under the Fourteenth Amendment.

The inherent power of the Court of Criminal Appeals to modify sentences on appeal is clearly authorized under the statutory provisions of the laws of the State of Oklahoma. Title 22 O.S. 1971, § 1066 states:

> "The appellate court may reverse, affirm or modify the judgment appealed from, and may, if necessary or proper, order a new trial. In either case, the cause must be remanded to the court below, with proper instructions, and the opinion of the Court within the time, and in the manner to be prescribed by rule of the Court."

The Oklahoma Court has consistently exercised its right to correct or modify sentences on appeal for a myriad of reasons. Such action has repeatedly been upheld. See Carbray v. State, Okl.Cr., 435 P.2d 188 (1967), cert. den., 392 U.S. 916 (1968).

In the case at bar, the Court of Criminal Appeals reviewed all the testimony and found no errors requiring reversal or modification of the sentence. They further determined that the forty (40) years assessed by the Jury was well within the purview of § 51(A). Hicks v. State, Okl.Cr., Unpub. Op. No. 77-751.

It is further well established that federal appellate courts are without power to control or modify a sentence which is within the limits fixed by a valid statute unless clearly excessive. In Hayes v. United States, 238 F.2d 318, 322, cert. den., 353 U.S. 983, 77 S. Ct. 1280, 1 L. Ed. 2d 1142, this court stated:

> "The fixing of penalties for crimes is a Congressional function, and what constitutes adequate punishment is ordinarily left to the discretion of the trial judge. If the sentence is within the statutory limit, appellate courts will not interfere unless clearly cruel and unusual." (Emphasis added)

This Court has previously adopted language found in the Tenth Circuit case of Smith v. United States, 273 F.2d 462 (10th Cir. 1959), which, in discussing the aspects of modifying a sentence of fifty-two (52) years for a first-time offender and which they considered "greater than should have been imposed," stated at page 468:

> "In effect, we are asked to enter the domain of penology, and more particularly that tantalizing aspect of it, the proper apportionment of punishment. Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, see Radzinowicz, A History of English Criminal Law: The Movement for Reform, 1750-1833, passim, these are peculiarly questions of legislative policy. Equally so are the much mooted problems relating to the power of the judiciary to review sentences. First the English and then the Scottish Courts of Criminal Appeal were given power to revise sentences, the power to increase as well as the power to reduce them. See 7 Edw. VII, c. 23, § 4(3); 16 & 17 Geo. V., c. 15, § 2(4). This Court has no such power."

Respondents submit that the Constitution of the United States permits qualitative differences in meting out punishment and there is no requirement that two persons convicted of the same offense receive identical sentences. See Williams v. Illinois, 399 U.S. 235, 26 L. Ed. 2d 586, 90 S. Ct. 2018 (1970).

Petitioner falls within those class of cases where punishment was imposed under a section of the Habitual Criminal Act subsequently determined invalid, but which did not impair the remaining provisions of the Act. Within those class of cases, the Oklahoma Court of Criminal Appeals has exercised its inherent power, on a case by case basis, to correct the sentence through modification, or alternatively, to affirm the ultimate findings of the jury or trial court.

In summation, it is clear that Petitioner has failed to prove a "purposeful discriminatory" action. Snowden v. Hughes, 321 U.S. 1, 8, 9, 88 L. Ed. 497, 502, 503, 64 S. Ct. 397. Therefore, Respondents submit that there has been no Constitutional violation of the Equal Protection Clause of the Fourteenth Amendment and Petitioner's claim of constitutional infringement must fail.

PROPOSITION II

PETITIONER WAS NOT DENIED DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT BY VIRTUE OF THE OKLAHOMA COURT OF CRIMINAL APPEALS FAILURE TO REMAND THIS CONVICTION FOR RESENTENCING IN THE DISTRICT COURT.

Petitioner urges that he has an absolute right to have a new sentencing trial or a new penalty stage and cites decisions of this Court as authority for his position as follows: United States v. Jackson, 390 U.S. 5&0, 20 L. Ed. 2d. 138, 88 S. Ct. 1209 (1968); Bordenkircher v. Hayes, 434 U.S. 357, 54 L. Ed. 2d. 64, 98 S. Ct. 663, reh. den., 435 U.S. 918, 55 L. Ed. 2d. 511, 98 S. Ct. 1477 (1978); Corbitt v. New Jersey, ___ U.S. ___, 58 L. Ed. 2d. 466, 99 S. Ct. 492 (December 11, 1978); Gardner v. Florida, 430 U.S. 349, 51 L. Ed. 2d 393, 97 S. Ct. 1197 (1977); Presnell v. Georgia, ___ U.S. ___, 58 L. Ed. 2d. 207, 99 S. Ct. 235 (November 6, 1978). As Mr. Hicks noted in his Petition for Certiorari at Page Nine (9), "each case is distinguishable from the facts here." Respondents would agree that the above cited cases fail to shed any light on the issue of due process under the facts of the instant case.

In Oklahoma pursuant to 22 O.S. 1971, § 926, a defendant has a right to request a jury to set his punishment, but if for some reason the jury fails to do so, then it is encumbent on the trial curt to pronounce the sentence. See 22 O.S. 1971, § 927. These provisions read in conjunction with 22 O.S. 1971, § 1066 allowing the appellate court to modify sentences from the basis of Oklahoma's standards rgarding sentencing. While in some jurisdictions the petitioner's case might have had to be remanded for a new second stage trial, in Oklahoma it is not necessary and is not a violation of due process. See Drennan v. State of Oklahoma, Okl.Cr., 581 P.2d 901 (1978), cert. den. No. 70-1250 (December 4, 1978).

It is fundamental that the Due Process Due Clause of the Fourteenth Amendment affords an accused certain procedural safeguards within the confines of criminal justice to insure the preservation of life, liberty and the pursuit of happiness against the arbitrary action of the body politic. In Screws v. United

States of America, 325 U.S. 91, 89 L. Ed. 1503, 65 S. Ct. 1031 (1945), this court stated in the body of its opinion, quoting from Twining v. New Jersey, 211 U.S. 78, 101, 53 L. Ed. 97, 107, 29 S. Ct. 14:

> ". . . that due process requires that 'no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in hi private right, and guard him against the arbitrary action of government."

In Snyder v. Massachusetts, 291 U.S. 97, 105, 78 L. Ed. 674, 677, 54 S. Ct. 330, 90 A.L.R. 575, it was said that due process prevents state action which "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

In the case at bar, Mr. Hicks received a fair and impartial trial; was represented by counsel; was given the opportunity to cross-examine his accusers; and exercise his right against self-incrimination and correctly sentenced under the existing law. In essence, he was accorded the basic fundamental procedural aspects of due process as envisioned by the Fourteenth Amendment.

If Petitioner was deprived of "liberty," Respondents submit that it was not by reason of a denial of due porcess, but rather through the imposition of an excessive sentence in violation of the Eighth Amendment prohibition against cruel and unusual punishment.

In conclusion, Respondents submit that there exists no vehicle in the State of Oklahoma whereby Mr. Hicks may be resentenced at a "new penalty stage" in the District Court. The jury assessed punishment after hearing testimony reflecting the facts of the case. A "new penalty stage" in effect would require a new criminal trial in its entirety.

It is further clear that should punishment be reimposed in accordance with 21 O.S. Supp. 1976, § 51(A), a term of imprisonment could be assessed against Mr. Hicks from ten (10) years to life, resulting in a concededly greater punishment than the forty (40) years he received.

It is, therefore, respectfully submitted that Mr. Hicks' allegations of a denial of due process falls exceedingly short of raising a fundamental constitutional issue upon which relief may be granted by this Honorable Court.

PROPOSITION III

THE IMPOSITION OF A FORTY (40) YEAR PRISON TERM FOR THE OFFENSE OF UNLAWFUL DISTRIBUTION OF A CONTROLLED DANGEROUS SUBSTANCE, AFTER FORMER CONVICTION OF A FELONY, IS NOT EXCESSIVE AND DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT.

Under the facts adduced below during the second phase of the sentencing trial, the evidence and testimony established that Mr. Hicks had previously been convicted of two prior felonies. On June 4, 1970, Mr. Hicks entered a voluntary plea of guilty to the charge of Burglary in the Second Degree, Case No. 70-1250. Thereafter, on October 21, 1975, Mr. Hicks again entered a voluntary plea of guilty to the charge of Assault with a Dangerous Weapon with intent to do Bodily Harm, Case No. 75-2198. Mr. Hicks received suspended jail terms in both cases.

Under the then existing Oklahoma law, 21 O.S. Supp. 1976, § 51(B), the trial court instructed the jury that a mandatory sentence of forty (40) years should be imposed in the event the jury found the Petitioner to have committed two (2) prior felonies.

As discussed in Propositions I and II, § 51(B) was declared unconstitutonal by the Oklahoma Court of Criminal Appeals subsequent to the imposition of punishment in the case at bar.

It is the position of Mr. Hicks that a forty (40) year prison term is excessive and constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

The present test enunciated by this court in reviewing sentences as "excessive" and violative of the Cruel and Unusual Clause of the Eighth Amendment is reflected in the case of Coker v. Georgia, 433 U.S. 584, 592, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1976). Although this Honorable Court has never held punishment unconstitutional because of length alone, the "proportion-

ality concept" is equally applicable under the facts herein presented. In Coker supra, this court, citing from Gregg v. Georgia, 428 U.S. 153, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976), stated:

> "a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to the accepted goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime.

Under the first criteria, Oklahoma's Habitual Criminal Act was intended by the Legislature to authorize progressively greater punishment for habitual criminals. That intent was not destroyed by the invalidation of 21 O.S. Supp. 1976, § 51(B), but prevails in the remaining provisions of the Act.

Thus, it is clear that a rational basis exists to justify enhancement of the length of a prison term for criminal offenders habitually found ignoring the rights of innocent victims.

Secondly, under 63 O.S. Supp. 1976, § 2-401 Petitioner received the maximum term of twenty (20) years. A myriad of State Court decisions have rejected the theory of excessive punishment in similar cases involving Distrbution of a Controlled Dangerous Substance wherein the sentence reflects a term of twenty (20) years or more. See People v. Keller, 54 Cal. Rptr. 154 (1966), People v. Tuckey, 234 N.E.2d 26 (Ill. 1967); People v. Venable, 361 N.Y.S.2d 398 (1974); Seguro v. State of Texas, 427 S.W.2d 865 (Tex. 1968); Williams v. State of Texas, 476 S.W.2d 675 (Tex. 1972); State v. Coutchen, 424 P.2d 865 (Kan. 1967); State v. Abercrombie, 318 N.E.2d 179 (Ohio 1973); Rodriguez v. State, 509 S.W.2d 625 (Tex. 1974); People v. Beavers, 393 Mich. 554, 227 N.W.2d 511 (1974); State v. Espinosa, 101 Ariz. 474, 421 P.2d 322 (1966); State v. Harms, 507 S.W.2d 29 (La.1974).

Further, a limited review of the laws from other states reveals a similar intent to authorize enhanced prison terms for habitual criminal offenders. [1]

These Recidivist statutes have been upheld many times against a variety of challenges. [2]

In a recent Fourth Circuit case, Davis v. Davis, 585 F.2d 1226 (4th Cir. 1978), the court overturned a district court decision which found two twenty year consecutive terms for distribution and possession of marijuana as excessive in violation of the cruel and unusual prohibition of the Eighth Amendment. The defendant in the Davis case, supra, relied primarily on Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), cert. den., 415 U.S. 938, 94 S. Ct. 1454, 39 L. Ed. 2d. 495 (1974). The district court borrowed from Hart the guidelines which were used in that decision to determine the constitutionality of the sentence imposed. At page 1231 of the Davis decision, the Fourt Circuit noted those guidelines.

> "The guidelines included the nature of the offense committed, the legislative purpose behind the punishment, the punishment imposed in other jurisdictions for the same offense, and the punishment imposed in the same jurisdiction for other offenses.

The Court determined that the scope of their inquiry as to excessiveness of the punishment need not be as broad as the inquiry in Hart where a life sentence was imposed. The Court went on to say:

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1 Kansas, KSA 21-4504; Arizona, ARS § 36-1002.02; Michigan, MCLA §§ 335.152, .341; Texas, UTCA Penal Code § 12.42(D); Missouri, RS. Mo. VAMS § 195.200; Wisconsin, WSA, § 161.28; Nebraska, R.R.S. § 29-2221 (Hab. Crim. Stat.); Minnesota, 26 USCA § 2591(a) New York Narcotic Drug Impact § 2, 21 U.S.C.A. §§ 173, 174.

2 Oyler v. Boles, 368 U.S. 448, 82 S. Ct. 501, 7 L. Ed. 2d. 446 (1961); Gryger v. Burke, 334 U.S. 728, 732, 68 S. Ct. 1256, 92 L. Ed. 1683 (1948); Graham v. West Virginia, 224 U.S. 616, 623 (1912); McDonald v. Massachusetts, 180 U.S. 311, 312, 21 S. Ct. 389, 45 L. Ed. 542 (1901); Moore v. Missouri, 159 U.S. 673, 677, 16 S. Ct. 179, 40 L. Ed. 301 (1895); Wilson v. Slayton, 470 F.2d 986 (4 Cir. 1972); Wessling v. Bennett, 410 F.2d 205 (8 Cir. 1969); Price v. Allgood, 369 F.2d 376 (5 Cir. 1966) cert. denied, 386 U.S. 998, 87 S. Ct. 1321, 18 L. Ed. 2d. 349 (1967); see generally, Katkin, Habitual Offender Laws: A Reconsideration, 21 Buffalo L. Rev. 99 (1971).

> "In an attack for excessiveness on a sentence for a number of years, any authorized inquiry of the court should extend only to the consideration of the seriousness of the offense committed and the application of the sanction imposed for that offense. We can give no relief unless the sentence imposed is "grossly disproportionate to the severity of the crime." Ingraham v. Wright, 430 U.S. 651, 667, 97 S. Ct. 1401, 1410, 51 L. Ed. 2d 711 (1977). And in those cases where the challenged sentence is fixed by a jury within the limits imposed by statute, we afford special deference to the legislative and jury determination of the seriousness of the offense, and whether the punishment is cruel and unusual. See Gregg v. Georgia, 428 U.S. 153, 174-184, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). Thus, the sentence will not be considered grossly disproportionate to the severity of the offense unless tere are "extraordinary and special circumstances" which make an otherwise valid sentence cruel and unusual. United States v. Wooten, 503 F.2d 65, 67 (4th Cir. 1974).

The Court thereupon concluded that there was no extraordinary and special circumstances, and was of the opinion that the sentences were not so excessive as to shock human sensibilities.

In the case at bar, it is clear that the prior crimes committed by Mr. Hicks involved the potentiality of violence and danger to life as well as property. Such crimes cannot be considered "trivial" under the arguments presented in Rummel v. Estelle, now pending before this court.

In light of the similarity of sentences imposed in other jurisdictions; the nature of the present offense and the severity of prior offenses, Respondents submit that the forty (40) year sentence in this case is not "grossly disproportionate" to the accepted measure of punishment.

It is further Respondents position that the instructions complained of by Mr. Hicks did not hamper the jury's initial decision of guilt. Concededly, the jury imposed the "mandatory" sentence, but upon a review of the case by the Oklahoma Court of Criminal Appeals, it is clear that the punishment was well within the remaining provisions of the Habitual Criminal Act.

Therefore, Respondents urge this court to affirm the judgment and sentence and determine that the sentence resides out-

side the boundary of those cases which create a violation of the cruel and unusual punishment provision of the Eighth Amendment.

CONCLUSION

Oklahoma contends that there was no "purposeful discriminatory" action imposed by the Court of Criminal Appeals in refusing to modify the term of punishment which resulted in a denial of equal protection. Nor was there a denial of due process by reason of the Court of Criminal Appeals failure to remand the case for further proceedings in light of its prior holding in Thigpen, supra. Even though the sentence imposed was under a section of the Oklahoma Habitual Criminal Act declared unconstitutional, the remaining provisions of the Act were not impaired and the sentence was clearly within the boundaries of the intact portion of the Act.

Finally, the forty (40) year term is clearly within the accepted sphere of punishment followed in other jurisdictions for offenses of this nature. That it was enhanced by virtue of Mr. Hicks prior criminal acts clearly follows the Legislative intent to authorize progressively greater sentences for habitual offenders.

Respectfully submitted,

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